TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 17, 2005, at 10:00 a.m., or as soon thereafter as the matter may be heard in the above-entitled court, located at 312 North Spring Street, Los Angeles, California, Defendants Southern California Gas Company ("SoCalGas") and Southern California Gas Company Pension Plan (the "Plan") will move to dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(6) because plaintiffs' complaint, and each and every Claim for Relief asserted therein, fails to state a claim upon which relief can be granted.

Specifically, the First Claim for Relief, asserting a claim of age discrimination under ERISA § 204(b)(1)(H), does not state a claim first because that section applies only to participants who work beyond normal retirement age, which under the Plan is age 65. Thus, plaintiffs, who are 54 and 51, cannot state a claim under that section, nor do they have standing to do so. In any event, even if § 204(b)(1)(H) applied to participants younger than age 65, the First Claim for Relief should still be dismissed, because the plan is not age discriminatory as a matter of law.

The Second Claim for Relief, asserting that the Plan "backloads" the accrual of benefits in violation of ERISA § 204(b)(1)(B), is legally deficient. Plaintiffs' backloading claim is premised upon their comparison of one benefit under the Plan to another Plan benefit that is frozen. The Ninth Circuit, however, has expressly rejected an attempt to measure benefit accrual by comparing one benefit to another benefit that is frozen.

The Third Claim for Relief, asserting a claim of inadequate notice under ERISA § 204(h)(1), fails to state a claim because plaintiffs have failed to allege, as they must, that they suffered harm as a result of the allegedly inadequate notice.

Finally, the Fourth Claim for Relief, in which plaintiffs assert a state law discrimination claim under the California Fair Employment and Housing Act ("FEHA"), is preempted by ERISA.

This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Compendium of Authorities lodged herewith, all documents on file in this action, and such further or additional evidence or argument as may be presented before or at the time of the hearing on this Motion.

Dated: August 29, 2005

Respectfully submitted,

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By: [signature]
Michael C. Kelley
Attorneys for Defendants Southern California Gas Company and Southern California Gas Company Pension Plan

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MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendants Southern California Gas Company ("SoCalGas") and the Southern California Gas Company Pension Plan ("Plan") submit this memorandum of points and authorities in support of their Motion To Dismiss.

INTRODUCTION

Plaintiffs assert an age discrimination claim based on the unremarkable fact that younger workers have more years to work before reaching normal retirement age, 65, than older workers. This longer time to normal retirement leads to a most ordinary outcome – workers who start working at a younger age have more years to earn interest on their retirement Plan accounts than do workers who start at an older age. Plaintiffs claim that this outcome causes the Plan to discriminate against older workers in violation of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq. ("ERISA"). As a matter of both logic and law, that claim should be rejected. Similarly untenable are plaintiffs' contentions that the Plan is improperly "backloaded" in violation of ERISA and that the defendants violated ERISA by not providing adequate notice of the effect of the Plan amendment. Finally, plaintiffs' discrimination claim under the California Fair Employment and Housing Act ("FEHA") is barred by the broad, congressionally mandated preemption of state law claims relating to benefit plans subject to ERISA.

Specifically, plaintiffs' First Claim for Relief purports to state a claim for age discrimination under ERISA § 204(b)(1)(H). Section 204(b)(1)(H) prohibits a reduction in the "rate of benefit accrual, because of the attainment of any age." 29 U.S.C. § 1054(b)(1)(H)(i). The case law and legislative history establishes, however, that this section applies only to participants who work beyond normal retirement age, which under the Plan is age 65. Thus, plaintiffs, who are 54 and 51, cannot state a claim under that section. Even if § 204(b)(1)(H) applied to participants younger than age 65, the First Claim should still be dismissed, because the Plan is not age

discriminatory as a matter of law.

On July 1, 1998, SoCalGas amended the Plan to provide a cash balance benefit. Pursuant to that amendment a cash balance account was established for each active participant. Each account was initially credited with an amount equal to the participant's entitlement under the Plan before the amendment, plus a number of enhancements. Each month thereafter SoCalGas credited, and continues to credit, each participant's cash balance account with a percentage of his or her pay ("retirement credits"). Each account was also credited monthly with 1/12 of the average 30-year Treasury Bond rate ("interest credits"). For two SoCalGas employees of different ages who earn the same pay and have the same years of service, the older employee's cash balance account will always equal the younger employee's cash balance account on any given date. Thus, the cash balance benefit is neutral as to age, and the "rate of benefit accrual" is *not* reduced because of the attainment of any age.

Plaintiffs do not dispute that the Plan operates in this manner. Instead, they advance an unusual theory of age discrimination, the centerpiece of which would turn the effect of the time value of money into age discrimination. Even if two workers receive the same retirement credits and interest credits, after the older reaches retirement age the cash balance account of the younger will continue to earn interest until he or she retires. Not surprisingly, the contention that this constitutes age discrimination has been decisively rejected by two federal courts. See Eaton v. Onan Corp., 117 F. Supp. 2d 812, 832-33 (S.D. Ind. 2000); Tootle v. ARINC, Inc., 222 F.R.D. 88, 94 (D. Md. 2004). As those courts made clear, the "rate of benefit accrual" in § 204(b)(1)(H) refers to the change in an employee's cash balance account from one year to the next. The statute does *not* require employers to credit older workers with greater annual benefits simply because they have fewer years before retirement to accumulate benefits than younger workers.

Plaintiffs' Second Claim for Relief, which alleges that the Plan "backloads" the accrual of benefits in violation of ERISA § 204(b)(1)(B), is also legally deficient.

Under the Plan as amended, if a participant terminated employment or commenced distribution of his or her benefit within five years of July 1, 1998, the participant received *either* his or her cash balance account or the benefit resulting from the pre-amendment Plan formula, enhanced to include the participant's incentive pay ("the Enhanced Prior Plan Benefit"), whichever was greater.[1] A participant who remained in covered employment throughout the five year period after July 1, 1998 earned benefits under the Enhanced Prior Plan Benefit portion of the formula until June 30, 2003, at which time their prior plan benefit was frozen. Any participant who left the company after June 30, 2003 was entitled, and current participants continue to be entitled, to receive the *greater of* their cash balance benefit or their frozen accrued Enhanced Prior Plan Benefit on June 30, 2003 (a benefit that is amended to cease additional accruals is commonly referred to as a "frozen benefit"). Plaintiffs claim that when their cash balance benefit is less than their frozen benefit, plaintiffs experience a period of zero benefit accrual. The Ninth Circuit, however, has expressly rejected an attempt to measure benefit accrual by comparing one benefit to another benefit that is frozen. Instead, the accrual of the cash balance benefit *standing alone* must be measured without considering the frozen benefit. See Williams v. Caterpillar, Inc., 944 F.2d 658, 663 (9th Cir. 1991). Because plaintiffs concede that they in fact accrue regular retirement credits and interest credits, there are no periods of "zero accrual" for the cash balance benefit, and the Second Claim for Relief should be dismissed.

Plaintiffs' Third Claim for Relief, asserting a claim of inadequate notice under

[1] Plaintiffs' complaint does not mention that under the amendment the prior benefit formula was enhanced to include incentive pay or other various benefit enhancements adopted as part of the cash balance amendment. Defendants refer to those enhancements for accuracy and completeness here, although these facts are not material to defendants' motion to dismiss, which is addressed to the allegations of the complaint.

ERISA § 204(h)(1), also fails to state a claim because plaintiffs have failed to allege, as they must, that they suffered harm as a result of the allegedly inadequate notice. Finally, plaintiffs' Fourth Claim for Relief under FEHA is preempted by ERISA.

FACTUAL BACKGROUND

I. OVERVIEW OF PENSION PLANS.

A traditional defined benefit plan provides participants a fixed annuity benefit commencing upon their retirement that is determined pursuant to a formula set forth in the plan document. See, e.g., Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439-440, 119 S. Ct. 755, 761, 142 L. Ed. 2d 881, 892 (1999). Under many traditional defined benefit plans, the annuity benefit is the product of a certain percentage of the employee's final average compensation multiplied by the employee's years of service. See Eaton v. Onan Corp., 117 F. Supp. 2d 812, 817 (S.D. Ind. 2000). For example, a plan might provide retirement benefits equal to 2% of the employee's average annual compensation during the last five years of employment multiplied by his or her years of service. Under such a plan, an employee who worked for a company for 20 years and had a final average compensation of $50,000 would earn an annual retirement benefit of $20,000 (.02 x 20 x $50,000).[2]

A cash balance pension plan is a type of defined benefit plan in which each participant has a hypothetical "account" to which employer contributions in the form of pay credits and interest credits are allocated.[3] See id. For example, under a cash balance plan that provides a pay credit of 5% and an interest credit of 3%, a

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[2] In contrast to defined benefit plans, which provide for a specific benefit based upon a formula, defined contribution plans (such as 401(k) plans) provide that participants are entitled to the vested balance in their individual plan accounts, to which the employer and participants typically make periodic contributions. See Hughes Aircraft, 525 U.S. at 439; Eaton, 117 F. Supp. 2d at 817.

[3] The account is hypothetical because plan assets are not earmarked to pay only the benefits of the participant in whose name the account is established, but are maintained in a common fund to pay the benefits of any plan participant.

participant who earns $100,000 per year would be allocated a pay credit of $5,000 (.05 x $100,000) at the end of Year 1. In Year 2, if the participant's salary increased to $110,000, the participant's account would be credited with an amount equal to $5,650 (a pay credit of $5,500 (.05 x $110,000) plus an interest credit of $150 (.03 x $5000), representing the interest on the account balance from Year 1). At the end of Year 2, the participant's account would have a balance of $10,650 ($5,000 + $5,650). In contrast to traditional defined benefit plans, which usually provide benefits in the form of a monthly annuity commencing at normal retirement age, cash balance plans typically allow participants who terminate employment to receive their benefits in a lump-sum payment, which they can roll over into an IRA or another employer's qualified plan.

II. THE PLAN'S CASH BALANCE AMENDMENT.

On June 30, 1998, as part of a merger, SoCalGas became a part of Sempra Energy. At that time, the Plan, which was sponsored by SoCalGas, was amended to provide a cash balance benefit for employees who were not represented by a union. Under the Plan's terms, a cash balance account was established for each active participant in the Plan immediately prior to the cash balance amendment. The initial balance of each participant's account was equal to (or greater than) the actuarial equivalent of the participant's accrued benefit under the Plan prior to the effective date of the cash balance amendment. (See Cmplt. ¶ 17; n.1, supra). Thereafter, monthly pay credits ("retirement credits"), amounting on an annual basis to 7.5% of the participant's annual earnings (id., ¶ 18), and monthly interest credits have been allocated to each participant's account. The interest credits are determined by multiplying the cash balance account balance as of the prior month by 1/12 of the rate which equals the average 30-year United States Treasury Bond rate for the November preceding the first day of the current calendar year. (Id., ¶ 19).[4]

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[4] A participant who commenced cash balance participation on July 1, 1998, and who

(footnote cont'd)

The Plan also provides that any participant who became eligible for the cash balance benefit on July 1, 1998 and who began to receive benefits before July 1, 2003 was entitled to the *greater of* (1) the actuarial equivalent of his or her cash balance account expressed in the form of an annuity or (2) an annuity under the Enhanced Prior Plan Benefit formula, which was based on the pre-amendment Plan formula. (Id., ¶21). A participant who became eligible for the cash balance benefit on July 1, 1998 and terminates employment *after* June 30, 2003 is entitled to an annuity equal to the greater of (1) the actuarial equivalent of the cash balance account or (2) the frozen Enhanced Prior Plan Benefit. (Id., ¶ 24).

ARGUMENT

III. PLAINTIFFS' FIRST CLAIM FOR RELIEF FAILS TO STATE A CLAIM FOR AGE DISCRIMINATION.

Plaintiffs' First Claim for Relief is deficient because § 204(b)(1)(H) protects only participants who have reached normal retirement age. In addition, as a matter of law, the Plan is not age discriminatory.

A. ERISA § 204(b)(1)(H) Protects Participants Only After "Normal Retirement Age."

As a number of courts have held, the legislative history clearly demonstrates that Congress's purpose in enacting ERISA § 204(b)(1)(H) was to ensure that employees who continued to work *after normal retirement age* would continue to accrue benefits, not to create new rights for participants, such as plaintiffs here, who have not yet reached normal retirement age. In Eaton v. Onan, 117 F. Supp. 2d at 826-29, the court concluded that "[the legislative history] provides considerable

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was at least 40 years old with less than 15 years of service, received "special retirement credits," equal to an additional 2% of annual earnings until he or she completed 15 years of service. (Cmplt. ¶ 18). A participant who commenced cash balance participation on July 1, 1998 and who had less than 30 years of service also received a "special interest rate" (an additional 2%) on the initial balance until he or she completed 30 years of service. (Id., ¶ 19).

support for defendant's argument that Congress did not intend for the pension age discrimination provisions to apply to the rate of benefit accrual for participants under the age of 65." See also Tootle, 222 F.R.D. at 93 ("legislative history and statutory language provide strong evidence that [ERISA's age discrimination provisions are] not intended to protect workers until after they have attained normal retirement age."); Engers v. AT&T Corp., No. 98-3660, 2001 U.S. Dist. LEXIS 25889, at *10 (D.N.J. June 6, 2001) ("it is clear to this court that . . . Congress intended both the ADEA and ERISA provisions [ ] to apply only to those employees who continue to work after the normal retirement age of sixty-five."); see also Campbell v. BankBoston, N.A., 327 F.3d 1, 10 (1st Cir. 2003) (citing Eaton and reasoning that "the ERISA age discrimination provision may not even apply to workers younger than the age of normal retirement."); Lunn v. Montgomery Ward & Co., Inc. Retirement Security Plan, 166 F.3d 880, 883 (7th Cir. 1999) (recognizing that under ERISA § 204(b)(1)(H), an employer "could not say to [its employee], if you insist on working after you reach the age of 65, we're going to cut down your normal retirement benefits").

The legislative history provides ample support for those holdings. In 1986, Congress enacted the Omnibus Budget Reconciliation Act ("OBRA 1986"), which added parallel age discrimination provisions to ERISA at § 204(b)(1)(H), the Age Discrimination in Employment Act ("ADEA") at 29 U.S.C. § 623(i), and the Internal Revenue Code ("IRC") at 26 U.S.C. § 411(b)(1)(H). Congress made clear that these three provisions should be interpreted to have identical meaning. See H.R. Conf. Rep. No. 99-1012, at 378-79 (1986), reprinted in 1986 U.S.C.C.A.N. 3868, 4023-24; see also Eaton, 117 F. Supp. 2d at 822-23 (same).[5] The OBRA 1986 Conference Report

[5] The legislative history, including the relevant portions of the Conference Report and Congressional Record (see pp. 8-9, infra), is included in the accompanying document entitled "Compendium of Authorities."

states that the legislation was proposed to clarify whether employers had the right to cease accruing benefits for employees *upon reaching* normal retirement age.[6] Prior to the Department of Labor's ("DOL") transfer of the authority to enforce the ADEA to the Equal Employment Opportunity Commission ("EEOC"), the DOL had permitted employers "to cease benefit accruals and allocation to an employee's account with respect to employees working beyond the normal retirement age . . . ." See H.R. Conf. Rep. No. 99-1012, 2d Sess. at 378 (1986), reprinted in 1986 U.S.C.C.A.N. 3868, 4023. After obtaining authority over the ADEA, the EEOC rescinded the position formerly taken by the DOL in favor of an interpretation that *requires* employers to "continue benefit accruals and allocations" for employees who choose to work past normal retirement age. Id.

The Conference Report then states that these new provisions (including ERISA § 204(b)(1)(H)) would *not* apply to employees who have not reached normal retirement age:

> Under the conference agreement, the rules preventing the reduction or cessation of benefit accruals on account of the attainment of any age *are not intended to apply* in cases in which a plan satisfies the normal benefit accrual requirements *for employees who have not attained normal retirement age.*

Id. at 379 (emphasis added). The Conference Report's interpretation is entitled to dispositive weight. See Buckley v. Valeo, 424 U.S. 1, 51 n.57, 96 S. Ct. 612, 650 n.57, 46 L. Ed. 2d 659, 706 n.57 (1976) (court should not adopt an interpretation of a statute where the conference report "expressly provides for a contrary interpretation").

The unequivocal statements of the sponsoring legislators confirm this view.[7]

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[6] Next to the statute itself a conference report "is the most persuasive evidence of congressional intent." Dep't of Health and Welfare, State of Idaho v. Block, 784 F.2d 895, 901 (9th Cir. 1986); see also Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 835 (9th Cir. 1996) ("a congressional conference report is recognized as the most reliable evidence of congressional intent"); Eaton, 117 F. Supp. 2d at 827.

[7] "[S]tatements of sponsoring legislators are entitled to considerable weight" in discerning congressional intent. Eaton, 117 F. Supp. 2d at 827. See also NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58, 66, 84 S. Ct.

(footnote cont'd)

Senator Grassley introduced the bill that was eventually enacted as OBRA 1986 with the following remarks: "I am introducing legislation today that would amend the [ADEA] and [ERISA] to require continued pension benefit accruals *for workers who work past the normal retirement age of 65*." 131 Cong. Rec. S 9429 (daily ed. July 11, 1985) (emphasis added). Then-Representative Jeffords later explained:

> It is important for this body to understand what this "Older Americans Pension Benefits" provision does and does not do. What it does is prevent a covered employee pension benefit plan from eliminating or reducing an employee's pension benefit accruals, because of the attainment of any age, *for a period of employment after the employee attains the normal retirement age under his or her plan.*

132 Cong. Rec. H 11437 (daily ed. Oct. 17, 1986) (emphasis added).

Indeed, the heading of Section 9202 of OBRA 1986 is entitled "Benefit Accrual *Beyond Normal Retirement Age*." Pub. L. No. 99-509, 100 Stat. 1874, at 1975 (1986) (emphasis added).[8] That heading further confirms the Congressional intent and compels the conclusion that ERISA § 204(b)(1)(H) applies only to participants who have reached normal retirement age.

That conclusion dooms plaintiffs' age discrimination claim. Plaintiffs' theory is premised entirely upon their characterization of how amounts credited to a cash balance account *before* normal retirement age differ in value among participants when *projected forward* to age 65. (See, e.g., Cmplt. ¶ 35 (alleging that an interest credit allocated to a younger participant's account "will always be more valuable in terms of an age-65 annuity than the same hypothetical contribution to [an older participant's] account")). Plaintiffs have not yet reached age 65, and nowhere do they claim that the Plan's cash balance benefit discriminates against participants *after* they reach age 65, the point in time at which ERISA § 204(b)(1)(H) begins to protect participants.[9]

1063, 1068, 12 L. Ed. 2d 129, 135 (1964).

[8] Statutory headings can provide insight into a statute's meaning. Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212, 118 S. Ct. 1952, 1956, 141 L. Ed. 2d 215, 220 (1998).

[9] Nor would plaintiffs, who are 54 and 51, have standing to bring such a claim on

(footnote cont'd)

Plaintiffs' First Claim for Relief should be dismissed.

B. The Plan's Cash Balance Benefit Does Not Discriminate On The Basis Of Age In Violation Of ERISA § 204(b)(1)(H).

Apart from the fact that ERISA § 204(b)(1)(H) does not apply before normal retirement age, plaintiffs have not stated an age discrimination claim. Plaintiffs base their claim entirely on the effect of the time value of money:

> Because a younger Cash Balance Participant will always have more time to accrue compound interest on his or her Retirement Account Balance before he or she turns 65 than an older Cash Balance Participant does on the same account balance, an Interest Credit allocated to the former's account will always be more valuable in terms of an age-65 annuity than the same hypothetical contribution to the latter's account. In other words, in each year for which an Interest Credit is allocated to the participants' accounts, the younger participant ends up with a greater increase in his or her age-65 annuity than the older participant does, even though they both receive the same hypothetical interest rate on the same hypothetical account balance.

(Id., ¶ 35). That theory simply does not state a claim for age discrimination.

1. At Least Two Courts Have Rejected Plaintiffs' Theory.

At least two courts have soundly rejected the identical theory proffered by plaintiffs. In Eaton, the court held that the defendant's cash balance plan did not violate ERISA § 204(b)(1)(H). The linchpin of the plaintiffs' argument in Eaton, just as it is here, was that the phrase "rate of benefit accrual" in § 204(b)(1)(H) must be measured in terms of an annuity paid at normal retirement age, rather the year-over-year change in the cash balance account. The court began by noting that the phrase "rate of benefit accrual" is not defined in the statute, and accordingly the phrase "does not unambiguously require that the rate be measured, as plaintiffs contend, solely in terms of an annuity payable at normal retirement age." Id. at 825. Rejecting the same

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behalf of participants older than age 65. See Cmplt. ¶¶ 8, 9; Engers, 2001 U.S. Dist. LEXIS 25889, at **12-13 (quoting O'Shea v. Littleton, 414 U.S. 488, 494, 94 S. Ct. 669, 675, 38 L. Ed. 2d 674, 682 (1974)) (where "none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class").

theory advanced by plaintiffs here, the court ruled that, "in the case of a cash balance defined benefit plan, the rate of benefit accrual should be defined as the change in the employee's cash balance account from one year to the next." Id. at 832-33.

The Eaton court gave several additional compelling reasons why plaintiffs' contention was wrong, each of which apply equally to the plaintiffs' claim here. First, plaintiffs' theory would outlaw what Congress *requires* for 401(k) defined contribution plans. Assuming the same investment performance, a 401(k) contribution to a younger employee's account will grow to a value on that employee's 65th birthday that is greater than the value to which the same dollar amount contributed to an older employee's account will grow on his or her 65th birthday. As the court noted, "The ADEA and ERISA *require* such treatment of employees of different ages in defined contribution plans . . . . It is difficult to fathom why Congress might have wanted to outlaw similar effects under defined benefit plans." Id. at 831 (italics in original).

Second, under plaintiffs' theory the very plan that Congress said was *not* age discriminatory would be illegal. Congress specifically set forth in the Conference Report an example of a defined benefit plan that would comply with the new age discrimination provisions. H.R. Conf. Rep. No. 99-1012, at 381; 1986 U.S.C.C.A.N. at 4026. "Plaintiff's interpretation would transform that example of compliance into an example of a violation." Eaton, 117 F. Supp. 2d at 830.

Third, plaintiffs' theory essentially faults employers for providing interest credits that protect a participant's pay credit from the brunt of inflation before the participant is eligible to take a distribution. The court noted that "[a]dopting plaintiff's proposed statutory interpretation would thus give employers a perverse incentive *not* to guarantee at least some level of growth in the value of a pension over time." Id. at 832 (emphasis in original).

Fourth, plaintiffs' theory would require speculative and unsupported assumptions about what interest rates will be in the future and how each participant

could be affected. "It is hard to believe that, for purposes of determining whether a pension plan discriminates against participants on the basis of age, Congress would have intended to require the use of estimates . . ." Id. at 833. Like the plan in Eaton, the Plan's interest crediting rate is tied to a fluctuating rate, that of 30-year U.S. Treasury Bonds. Because the interest rate on 30-year Treasury Bonds in the future cannot be known now, it is impossible to determine precisely what value a participant's benefit will have at age 65.

Another district court recently adopted the holding and rationale of the Eaton decision. See Tootle, 222 F.R.D. at 93-94. Like plaintiffs here, the plaintiff in Tootle contended that the compounding effect of interest credits resulted in a reduction in the "rate of benefit accrual" when measured as an age 65 annuity. Agreeing with the Eaton court, the Tootle court adopted the same interpretation of the phrase "rate of benefit accrual," holding that the proper approach is to "measure benefit accrual under cash balance plans by examining the rate at which amounts are allocated and the changes over time in an individual's account balance." Id. at 94. Under that measure, the Plan does not discriminate based on age. Id.

2. The Only Decision Holding A Cash Balance Plan To Discriminate On The Basis Of Age Is Not Persuasive Authority And Should Be Rejected.

The only decision in which any court has adopted plaintiffs' theory of age discrimination is Cooper v. The IBM Personal Pension Plan, 274 F. Supp. 2d 1010 (S.D. Ill. 2003). Relying entirely on an unsupported parsing of the language of § 204(b)(1)(H) as well as the language, according to the court, that Congress *meant* to use, the court concluded that the cash balance plan in that case ran afoul of § 204(b)(1)(H).

The Cooper court concluded that "the best interpretation" of the phrase "rate of benefit accrual" is that it "refers to an employee's age 65 annual benefit and the rate at which that age 65 annual benefit accrues." Id., at 1016. Because the court viewed this as simply another way of saying "accrued benefit" – a defined term in ERISA – the

Cooper court essentially decided that when Congress used the phrase "rate of benefit accrual" (not a defined term), it really meant to use the defined term "accrued benefit." However, it is a fundamental principle of statutory construction that when Congress uses different words, it intends different meanings. See Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 496-97, 112 S. Ct. 2589, 2605, 120 L. Ed. 2d 379, 402 (1992). The court did not explain why if Congress meant to use the phrase "accrued benefit," it instead used a different term.

The Cooper court reached its conclusion without any support from the statute or its legislative history, and without consideration of practical factors. Remarkably, the Cooper court did not even cite Eaton, decided only a year earlier, which was the only case at that time to consider whether cash balance plans violate ERISA § 204(a)(1)(B), or explain how its decision could possibly withstand the numerous and compelling rationales that the Eaton court provided in support of its well reasoned holding. Indeed, the Cooper court did not offer one shred of evidence that Congress intended the conclusion that the court reached. Rather, the court relied on its own notion of proper grammar. According to the court, Congress intended to use the term "accrued benefit" (i.e., a benefit expressed in the form of an annual benefit commencing at normal retirement age), but instead used the phrase "rate of benefit accrual" because it would have been "clumsy" for Congress to say "rate of accrued benefit." 274 F. Supp. 2d at 1016. However, there are other ways that Congress could have drafted § 204(b)(1)(H) to say "accrued benefit" – if that was the term Congress actually intended to use.[10] As the Eaton court noted, while a distinction between the terms "accrued benefit" and "rate of benefit accrual" may seem like "hair-splitting," "pension law is a highly technical field where hairs are split with even

[10] For example, Congress could easily have drafted Section 204(b)(1)(H) to prohibit defined benefit plans in which ". . . the rate of increase in an employee's accrued benefit is reduced because of the attainment of any age."

finer razors." 117 F. Supp. 2d at 830. In Tootle, the court rejected the Cooper decision and followed Eaton. This Court should do the same.

3. Plaintiffs' Age Discrimination Theory Should Be Rejected for Additional Reasons

a. *Plaintiffs' Theory Impermissibly Claims Age Discrimination Based Solely On The Effect Of The Time Value Of Money.*

By insisting that this Court compare the value of a benefit at two distant points in time (one participant's 65th birthday and a younger participant's later 65th birthday), plaintiffs ask this Court to ignore the critical fact that at any *one* moment in time those participants' account balances are identical, given the same years of service and compensation. For example, assume that Employee A is 45 years old with 15 years of service and an annual salary of $65,000, and Employee B is 54 years old with the identical years of service and salary. Under the Plan, both employees would receive an annual retirement credit of 7.5% of $65,000, or $4,875.[11] Both would also receive the same interest credit on that $4,875 based upon the rate of the applicable 30-year U.S. Treasury Bonds. Assume that the 45-year old Employee A and the 54-year old Employee B both terminate employment after their cash balance accounts are credited with the $4,875 pay credit, but they elect not to receive their distributions until they attain age 65. Each year, the dollar amount in their respective cash balance accounts will be identical, and will reflect the $4,875 pay credit plus the interest earned on that retirement credit. The older Employee B would, at age 65, receive an annual annuity reflecting nearly 11 years of compounding interest credits. At that time, the dollar amount in Employee A's cash balance account will be *identical* to that of older Employee B. If, however, younger Employee A were to continue accruing interest credits after older Employee B reaches retirement age and begins taking distributions,

[11] Although the cash balance benefit adds retirement credits and interest credits to participants' cash balance accounts every pay period, for simplicity this example assumes annual crediting.

younger Employee A would, at age 65, receive an annual annuity that reflects an additional 9 years of compounding interest credits, simply reflecting their age difference.

That phenomenon merely reflects the time value of money; it is not age discrimination. See Eaton, 117 F. Supp. 2d at 823 (the difference in the value of normal retirement age annuities for participants of different ages is simply the result of the time value of money and is inherent in virtually all cash balance plans). The rate at which retirement credits and interest credits accrue to participants' accounts is not reduced because of age but is age neutral. Nothing in ERISA § 204(b)(1)(H) requires that older participants receive greater annual accruals simply because they have fewer years to accumulate retirement benefits than do younger employees. See Lunn, 166 F. 3d at 883 (worker who retires after age 65 is not entitled to receive an extra pension benefit solely on account of his age merely because his life expectancy is shorter than a worker who retires earlier; both workers have been treated identically and it is "unlikely that ERISA would require a subsidy for older workers").

In addition, plaintiffs' position contradicts the principle that changes in the value of benefits that merely correlate with age, but are not *caused* by age, cannot be deemed unlawful age discrimination. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 612-13, 113 S. Ct. 1701, 1707-08, 123 L. Ed. 2d 338, 348-49 (1993) (an employment decision premised upon an age-correlated but analytically distinct factor does not constitute age discrimination); Eaton, 117 F. Supp. 2d at 831-32 (ERISA § 204(b)(1)(H) does not prohibit reductions in benefits based upon years of service "despite the one-to-one correlation of age and years of service").

b. *Plaintiffs' Theory Directly Contradicts Authoritative Guidance From the U.S. Treasury Department.*

The Treasury Department specifically considered and rejected the very age discrimination theory that plaintiffs offer. In a 1991 preamble to final regulations under section 401(a) of the Internal Revenue Code, the Treasury Department stated:

> The fact that interest adjustments through normal retirement age are accrued in the year of the related hypothetical allocation will not cause a cash balance plan to fail to satisfy the requirements of section 411(b)(1)(H) [the parallel provision to ERISA § 204(b)(1)(H)], relating to age-based reductions in the rate at which benefits accrue under a plan.

56 Fed. Reg. 47,524, 47,528 (Sept. 19, 1991).[12] Further, the regulations issued with this preamble contained a safe harbor that would allow cash balance plans to provide benefits that do not discriminate in favor of highly compensated employees. The safe harbor design required, among other things, uniform interest credits using any one of several specified bases until normal retirement age. 26 C.F.R. § 1.401(a)(4)-8(c)(3). Plaintiffs' theory would invalidate as age discriminatory the very interest crediting feature that the Treasury Department authorized under final regulations.

c. *Plaintiffs' Theory Would Outlaw The Interest Crediting Feature That Congress Mandated In Certain Defined Benefit Pension Plans.*

Similarly, ERISA § 204, the very section upon which plaintiffs rely, mandates the payment of interest in a manner that results in the same pattern of accruals that plaintiffs claim violates ERISA § 204(b)(1)(H). Specifically, ERISA § 204(c)(2)(B), dealing with defined benefit plans that require employee contributions, provides that a participant's accrued benefit derived from his or her own contributions is the amount equal to the participant's contributions expressed as an annuity beginning at normal retirement age, using an interest rate specified in the statute to project the value of such contributions to the participant's normal retirement date. Plaintiffs' theory would invalidate § 204(c)(2)(B), because, for example, if Employees A and B in the example above, one age 45 and another age 54, make the same contributions and

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[12] The Treasury Department holds exclusive administrative jurisdiction over the interpretation of ERISA § 204(b)(1)(H). See Reorganization Plan No. 4, 43 Fed. Reg. 47,713 (Sept. 20, 1978). Hence, its pronouncements are entitled to great deference. See Fidelity Fed. Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 158 n.13, 102 S. Ct. 3014, 3025 n. 13, 73 L. Ed. 2d 664, 678 n.13 (1982) (preamble represents "the administrative construction of the regulation, to which 'deference is clearly in order.' Udall v. Tallman, 380 U.S. 1, 16, 85 S. Ct. 792, 801, 13 L. Ed. 2d 616, 625 (1965)").

receive the same statutorily mandated interest, the value of the younger participant's annuity at age 65 will be greater than the value of the older participant's annuity, simply because the younger participant's account has 9 more years to earn interest. The United States Supreme Court requires that this Court not adopt statutory interpretations that would lead to such "improbable results." See Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 81, 115 S. Ct. 1223, 1229, 131 L. Ed. 2d 94, 102 (1995) (reading the pension plan amendment rules in ERISA § 402(b)(3) to require that detailed amendment procedures be set forth in the plan might lead to the invalidation of existing amendment procedures and "Congress could not have intended that result"); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 120 S. Ct. 1291, 1300, 146 L. Ed. 2d 121, 134 (2000) ("[a] court must…interpret [a] statute as a symmetrical and coherent regulatory scheme, . . . and fit, if possible, all parts into an harmonious whole") (internal citations and quotations omitted).

Thus, the proper measure of the "rate of benefit accrual" applicable to cash balance benefits for purposes of ERISA § 204(b)(1)(H) is the rate at which participants' accounts change from year-to-year. Eaton, 117 F. Supp. 2d at 832-33; Tootle, 222 F.R.D. at 94. Under the Plan, participants' accounts accrue retirement credits at the same rate, regardless of age. Interest credits are allocated to all accounts in the same manner, regardless of age. Accordingly, under Eaton and Tootle and for the reasons set forth above, plaintiffs' First Claim for Relief should be dismissed.

IV. PLAINTIFFS' SECOND CLAIM FOR RELIEF FAILS TO ALLEGE A VIOLATION OF ERISA'S BACKLOADING RULES.

Plaintiffs' Second Claim for Relief alleges that the Plan fails to comply with ERISA's backloading rules because for some years participants' frozen benefits are greater than their cash balance benefits. Plaintiffs admit that their cash balance accounts are credited with monthly retirement and interest credits (Cmplt. ¶¶ 18-19); therefore there are no periods of "zero accrual." Plaintiffs nonetheless contend that they are *experiencing* "zero accrual" until the value of their cash balance benefits

exceeds their frozen benefit. They contend that, when this occurs, there is a violation of ERISA § 204(b)(1)(B), which provides that the rate of benefit accrual in any Plan year may not exceed 133-1/3% of the accrual in any other year (the "133-1/3% rule"). (Id., ¶¶ 58, 60).

There are two fundamental principles of ERISA which demonstrate that plaintiffs' theory is incorrect. First, ERISA requires that an accrued benefit can never be reduced. ERISA § 204(g). Second, an employer is free to change a plan's benefit formula to provide a less generous benefit in the future. See Pegram v. Herdrich, 530 U.S. 211, 225, 120 S. Ct. 2143, 2152, 147 L. Ed. 2d 164, 179 (2000). As a result, whenever an employer changes a plan benefit formula, the employer must at least provide that participants will receive the greater of the accrued-to-date benefit and the new benefit. If plaintiffs' theory were correct, an employer utilizing the 133-1/3% rule would never be able to exercise its right to make such a change and comply with § 204(g) using a "greater of" benefit formula. It is well-settled that "greater of" formulas are permissible under ERISA. See, e.g., Brody v. Enhance Reins. Co., No. 00 Civ. 9660, 2003 U.S. Dist. LEXIS 3785, at ** 26-27, 37-38 (S.D.N.Y. March 14, 2003); see p. 20-21, infra.

As plaintiffs concede, a defined benefit plan is not backloaded if it satisfies any one of three backloading rules. See ERISA § 204(b)(1)(A)-(C); Cmplt. ¶ 56. Plaintiffs address only one of the rules – the 133-1/3% rule – and do not even attempt to explain why the Plan would not satisfy the other two (the 3% and the fractional rules). ERISA § 204(b)(1)(A),(C). Instead, plaintiffs make the conclusory assertion that "[b]y definition, cash balance plans such as SCGC's cannot comply" with the other two rules, citing Esden v. Bank of Boston, 229 F.3d 154, 167 n.18 (2d Cir. 2000). The Esden court, however, simply noted without explanation that the parties did not dispute that the plan at issue *in that case* could only comply with the 133-1/3% rule. The court did not suggest that other cash balance plans could never satisfy the other two rules. Because plaintiffs have not alleged that the Plan fails all three

backloading rules, plaintiffs' Second Claim for Relief should be dismissed.

Indeed, the Ninth Circuit has rejected plaintiffs' theory of "zero" benefit accrual. See Williams v. Caterpillar, Inc., 944 F.2d 658 (9th Cir. 1991). In Williams, the plaintiffs were hired as hourly employees and were covered under a defined benefit plan for union employees, and later promoted to salaried positions and covered under a defined benefit plan for salaried employees. Plaintiffs later were demoted to union jobs and were again covered under the union plan rather than the salaried plan. Upon retirement, plaintiffs received a pension from whichever plan gave them a greater benefit, offsetting any benefits owed under the other plan. Id. at 663. Because plaintiffs' benefits under the union plan were less than the benefits they previously accrued under the salaried plan (which were no longer increasing due to their return to the union plan and therefore were effectively frozen), they received benefits under the salaried plan. Plaintiffs alleged that the union plan violated the accrual rules of ERISA § 204 because, as a result of plaintiffs' salaried benefit being the greater benefit, plaintiffs received no additional amounts for their final years of service while in the union plan. Id.

The Ninth Circuit upheld the benefit formula that provided participants with the greater of two benefits. The court expressly rejected the position plaintiffs advance here that their benefit accruals should be measured by considering both their frozen benefit and actively accruing benefits. Id. The court held that although the *amounts payable* to plaintiffs were calculated by determining whether their frozen accrued benefit or actively accruing benefit was greater, the *accrual rules* of ERISA § 204 are applied without taking the frozen benefit into account. Id. at 663. Thus, the union plan did not violate the accrual rules of ERISA § 204. Id. at 663-64.

The Ninth Circuit's holding in Williams is consistent with the IRS position regarding floor-offset arrangements, which are analogous to the Plan's formula.[13] In a

[13] Under a floor-offset arrangement, a participant's accrued benefit under a defined

(footnote cont'd)

floor-offset arrangement, a participant might receive no accrued benefit under a defined benefit plan in a year because it is offset by a greater benefit under a defined contribution plan, while the following year the participant might receive a benefit accrued under the defined benefit plan. Under plaintiffs' erroneous theory, this period of so-called zero accrual under the defined benefit plan followed by a positive accrual would be a *per se* violation of the 133-1/3% rule. However, the IRS has made clear that, in testing for compliance with the backloading rules,[14] including the 133-1/3% rule, the offset from the other plan is *ignored* and the plan complies as long as the defined benefit formula *itself* satisfies the backloading rules. Rev. Rul. 76-259, 1976-2 C.B. 111.

Indeed, if plaintiffs' approach to measuring benefit accrual were correct, *any* plan that gives participants the greater of two benefits, one of which is frozen, would result in a *per se* violation of the 133-1/3% rule. Under all such plans a participant may effectively earn no additional benefit for a certain period of time under one of the benefits followed by a year in which the participant would earn a benefit. But Congress, the Treasury Department, the IRS, and the courts have all recognized that this result is lawful. See, e.g., 26 C.F.R. § 1.401(a)(4)-13(c)(4)(ii) (allowing plans to use a formula that calculated participants' benefits as the greater of a frozen accrued benefit and a currently accruing benefit (referred to in the regulation as a "wear-away formula")); 26 C.F.R. § 1.401(a)(17)-1(e)(5), *Example 1*; S. Rep. No. 98-575, at 28-29 (1984), reprinted in 1984 U.S.C.C.A.N. 2547, 2574-75 ("greater-of" benefit was legal even though "the participant's accrued benefit . . . will not be increased by subsequent service or pay raises until the subsequent increase brings the participant's accrued benefit to a level in excess of the accrued benefit as of [the amendment

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benefit plan is offset by the benefit provided by a defined contribution plan. See, e.g., Rev. Rul. 76-259, 1976-2 C.B. 111.

[14] The backloading rules in Code § 411(b)(1) are the equivalent of the backloading rules in ERISA § 204(b)(1).

date]"); Brody v. Enhance Reins. Co., No. 00 Civ. 9660, 2003 U.S. Dist. LEXIS 3785, at **26-27, 37-38 (S.D.N.Y. March 14, 2003) ("greater-of" benefit did not violate ERISA § 204(g); "the greater-of method . . . has been consistently approved by the IRS" (citing Rev. Rul. 81-12, 1981-1 C.B. 228)); Corcoran v. Bell Atlantic Corp., No. Civ. A 97-510, 1997 WL 602859, at *3-4 (E.D. Pa. Sept. 23, 1997), aff'd, 159 F.3d 1350 (3d Cir. 1998) ("greater-of" benefit used in transition from traditional defined benefit to cash balance formula did not violate § 204(g)).

The rule that benefit accrual under a "greater-of" provision must be tested for backloading without regard to a frozen benefit makes sense, because there is only one actively accruing benefit – the other benefit is frozen. Plaintiffs' "zero accrual" backloading claim ignores this reality and is based entirely on the interplay between their frozen benefit and their cash balance benefit. However, like the plaintiffs in Williams, plaintiffs are accruing a cash balance benefit, even if it allegedly is currently less than their frozen benefit. There are no periods of zero accrual because the cash balance benefit increases each year. (Cmplt. ¶¶ 18, 19). Thus, the Second Claim for Relief should be dismissed.

V. PLAINTIFFS' THIRD CLAIM FOR RELIEF SHOULD BE DISMISSED FOR FAILURE TO ALLEGE PREJUDICE FROM THE ALLEGEDLY INADEQUATE NOTICE OF A DECREASE IN BENEFITS.

Plaintiffs' Third Claim for Relief contends that the notice that SoCalGas provided to participants regarding the adoption of a cash balance benefit violated ERISA § 204(h) because it did not inform participants that the adoption would result in a significant reduction in the rate of future benefit accrual. (Id., ¶¶ 36-40, 64-66). To state a claim under ERISA § 204(h), a plaintiff must allege that he or she was harmed in some way by the alleged lack of notice. Siles v. ILGWU Nat'l Retirement Fund, 783 F.2d 923, 930 (9th Cir. 1986) (employee must show harm from lack of notice); Allred v. First Nationwide Financial Corp., No. C-92-4000, 1994 U.S. Dist. LEXIS 21538, *16-19 (N.D. Cal. May 2, 1994), 1994 U.S. Dist. LEXIS 20245, *8 (N.D. Cal. Aug. 2, 1994) (employee must show substantive damages from alleged

lack of ERISA § 204(h) notice); Young v. St. Frances Xavier Cabrini Hosp. of Seattle, No. C87-973Z, 1989 U.S. Dist. LEXIS 18376, *11 (W.D. Wash. April 12, 1989) (employees could not recover under ERISA § 204(h) because they were not prejudiced by lack of notice), rev'd on other grounds, Johnson v. St. Frances Xavier Cabrini Hosp. of Seattle, 910 F.2d 594 (9th Cir. 1990); Frommert v. Conkright, 328 F. Supp. 2d 420, 436 (W.D.N.Y. 2004) (citing Burke v. Kodak Retirement Income Plan, 336 F.3d 103, 113-14 (2d Cir. 2003), cert. denied, 540 U.S. 1105 (2004)).

The purpose of ERISA § 204(h) is to give participants "the opportunity to take advantage of an existing benefit before it is lost." Frommert, 328 F. Supp. 2d at 436 (quoting Davidson v. Canteen Corp., 957 F.2d 1404, 1407 (7th Cir. 1992)). Even assuming *arguendo* that plaintiffs failed to receive adequate notice of changes to the Plan, they have not alleged that they have suffered any particular prejudice or harm from their alleged unawareness of the amendment. Accordingly, plaintiffs' claim under Section 204(h) should be dismissed.

VI. THE FOURTH CLAIM FOR RELIEF IS PREEMPTED BY ERISA.

Plaintiffs' attempt to allege a state law discrimination claim under the California Fair Employment and Housing Act, Cal. Gov. Code § 12900 et seq. ("FEHA"), see Cmplt. ¶¶ 67-72, is preempted by ERISA. 29 U.S.C. § 1144(a). ERISA is a "comprehensive and reticulated statute," Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361, 100 S. Ct. 1723, 1726, 64 L. Ed. 2d 354, 358 (1980), which governs the field of pension benefit plans. See generally New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 650-51, 115 S. Ct. 1671, 1674-75 , 131 L. Ed. 2d 695, 701-702 (1995). See also Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 60, 107 S. Ct. 1542, 1544, 95 L. Ed. 2d 55, 60 (1987). Congress's drafting of the ERISA statute "assures that federal regulation of covered plans will be exclusive." District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 127, 113 S. Ct. 580, 582, 121 L. Ed. 2d 513, 518 (1992). As the U.S. Supreme Court has observed, "the breadth of [ERISA's] pre-

emptive reach is apparent from the [statute's] language." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96, 103 S. Ct. 2890, 2899, 77 L. Ed. 2d 490, 501 (1983). ERISA broadly states that:

> [T]he provision of this title…shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a). A state law does not need to be "specifically designed to affect employee benefit plans" to be preempted. Rather, a state law claim is preempted if it "relates to" an ERISA plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. at 96 (holding that a state law claim that a health benefits plan violated the New Jersey human rights statute by discriminating on account of gender was preempted by ERISA).

Courts have held that FEHA claims such as plaintiffs' are preempted by ERISA. See, e.g., Stone v. Travelers Corporation, 58 F.3d 434 (9th Cir. 1995) (ERISA preempted age discrimination claim brought under FEHA); Champion Int'l Corp. v. Brown, 731 F.2d 1406, 1408-1409 (9th Cir. 1984) (state law claim of age discrimination in pension plan was preempted by ERISA). Indeed, in a case that is virtually identical to this one, the Central District of California (Judge Taylor) held that ERISA preempted a FEHA claim based on plaintiffs' theory that alleged that the conversion of a "traditional" pension plan into a cash balance plan discriminated against plaintiffs on the basis of age. See Order Granting in Part Defendants' Motion to Dismiss in Godinez v. CBS Corp., Case No. SA CV 01-28-GLT (Anx), at *5 (May 22, 2001), aff'd, 81 Fed. Appx. 949 (9th Cir. 2003) (unpublished). See also Martinez v. Maxim Property Management, 1997 WL 564070, at *4 (N.D. Cal. 1997) ("because plaintiff alleges…that his ability to receive retirement benefits was dependent on his age" his FEHA cause of action was preempted by ERISA); Dean v. Jet Services West, Inc., 782 F. Supp. 498, 500 (S.D. Cal. 1991) (plaintiff's age discrimination claim

preempted by ERISA). The Fourth Claim for Relief should be dismissed.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the complaint be dismissed in its entirety with prejudice.

Dated: August 29, 2005

Respectfully submitted,

SIDLEY AUSTIN BROWN & WOOD LLP
William F. Conlon
Anne E. Rea
Michael C. Kelley
Robert M. Stone

By: MCKelley
Michael C. Kelley
Attorneys for Southern California Gas Company and the Southern California Gas Company Pension Plan

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 555 West Fifth Street, Suite 4000, Los Angeles, California 90013-1010.

On August 29, 2005, I served the foregoing document(s) described as **NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on all interested parties in this action as follows:

Jeffrey Lewis
Vincent Cheng
LEWIS, FEINBERG, RENAKER & JACKSON, P.C.
1330 Broadway, Suite 1800
Oakland, CA 94612

James M. Finberg
Steven M. Tindall
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111

☒ (VIA U.S. MAIL) I served the foregoing document(s) by U.S. Mail, as follows: I placed true copies of the document(s) in a sealed envelope addressed to each interested party as shown above. I placed each such envelope with postage thereon fully prepaid, for collection and mailing at Sidley Austin Brown & Wood LLP, Los Angeles, California. I am readily familiar with Sidley Austin Brown & Wood LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 29, 2005, at Los Angeles, California.

Deborah J. Kelly

Deborah J. Kelly

<u>Hurlic v. Southern CA Gas Co.</u>

Order Granting Defendants' Motion to Dismiss

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID HURLIC, SUSANNA H. SELESKY, individually and on behalf of a class of all other persons similarly situated, Plaintiffs, v. SOUTHERN CALIFORNIA GAS COMPANY, THE SOUTHERN CALIFORNIA GAS COMPANY PENSION PLAN, Defendants.	CASE NO.: CV05-5027 R (MANx) ~~[Proposed]~~ **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)**

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Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Motion to Dismiss") came on for hearing on October 17, 2005 before the Honorable Manuel L. Real, in Courtroom 8 of the United States District Court for the Central District of California.

The Court, having fully considered the papers submitted by the parties in connection with the Motion to Dismiss, the argument of counsel, and all other papers filed with or submitted to the Court in connection with the proceedings in this action:

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' First Claim for Relief for Discrimination in violation of ERISA section 204(b)(1)(H) is dismissed without leave to amend for failure to state a claim.

2. Plaintiffs' Second Claim for Relief for Back-Loading in violation of ERISA section 204(b)(1)(A), (B), and (C) is dismissed without leave to amend for failure to state a claim.

3. Plaintiffs' Third Claim for Relief for Failure to Provide Proper Notice Under Anti-Cutback Rules in violation of ERISA section 204(h)(1) is dismissed with leave to amend for failure to state a claim. Plaintiffs shall have ten (10) days from the date of the hearing to amend their complaint.

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4. Plaintiffs' Fourth Claim for Relief for Disparate Impact for Age Discrimination under FEHA is dismissed without leave to amend for failure to state a claim.

SCANNED

IT IS SO ORDERED.

Dated: Oct. 18, 2005

United States District Court Judge

Presented by:

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